

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

Truman Medical Center, Inc.

Employer

and

Case 14-RC-260910

**SEIU Healthcare Missouri-Kansas, a division of
SEIU Healthcare Illinois/Indiana**

Petitioner

DECISION AND DIRECTION OF ELECTION

On May 28, 2020,¹ SEIU Healthcare Missouri-Kansas, a division of SEIU Healthcare Illinois/Indiana ("Petitioner"), filed its original petition in this case with the National Labor Relations Board ("Board"). By this petition, Petitioner seeks to add certain employees, employed at two Truman Medical Center, Inc. ("Employer") facilities located in Kansas City, Missouri, to an existing unit by way of a self-determination election. The petition in this case seeks to add a voting group of Mental Health Techs, Mental Health Tech W/E Alts and PRN Mental Health Techs ("mental health tech voting group") to the existing unit. I have addressed other voting groups Petitioner seeks to add to the same existing unit, by similar self-determination elections, in separate decisions.

The only matter at issue is whether the election should be conducted by manual or mail ballot method. Election arrangements, including the voting method, are not litigable matters at a pre-election hearing. See *Representation-Case Procedures*, 84 Fed. Reg. 69524, 69544 fn. 82 (2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)). See also, *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *Halliburton Services*, 265 NLRB 1154 (1982). On June 5, the parties entered into a stipulated record and shortly after, pursuant to that stipulation, submitted their positions to me on the voting method and details of election.

Based on the stipulated record, having reviewed the parties' positions, and having considered the factors discussed below, I have determined that because of the extraordinary circumstances presented by the ongoing COVID-19 pandemic, the Board will conduct this election by mail ballot.

POSITIONS OF THE PARTIES

Petitioner argues that a mail ballot election is the best procedure to use considering the ongoing COVID-19 pandemic. It notes Jackson County, Missouri, where the facilities at issue are located, has reported approximately 2,250 confirmed cases of COVID-19, and 49 deaths, and that, as of early June when the parties submitted their

¹ All dates are in 2020 unless otherwise noted.

positions on the election, Jackson County was experiencing an increase in COVID-19 cases.

Regarding the Employer's facilities specifically, Petitioner notes that, as hospitals, COVID-19 patients are on-site at least at one location. Further, for those patients that are not infected, COVID-19 presents a particular risk. Petitioner maintains the Employer's awareness of this risk is demonstrated by the Employer's suspension of regular visitor access to its facilities during the COVID-19 pandemic, a restriction that still is in place at both facilities at issue. Petitioner also posits that employees of a hospital are at a greater risk of carrying the virus that causes COVID-19, due to their potential exposure in the workplace, and Petitioner notes employees of the Employer have already tested positive for COVID-19.

On the issue of local restrictions and guidelines, Petitioner notes the Amended Emergency Order issued by the Mayor of Kansas City on May 28, and effective through July 5, encourages residents to avoid large groups and crowd-based activities.

The Employer does not contend that COVID-19 is no longer an issue in the community. However, it does maintain that "extraordinary circumstances" presented by the pandemic have passed, and that conditions have sufficiently improved to allow a return to in-person voting, the Board's longstanding preference. In addressing how circumstances have changed, the Employer contends numerous local restrictions on movement and travel have been reduced. The Employer notes the citywide "stay at home" order issued on March 21, which was originally very restrictive, was relaxed on May 15 to allow non-essential businesses to begin in-person operations with no more than 10 people or 10% of capacity, and restaurants to begin limited in-person service. Further, effective May 31, all non-essential businesses are allowed in-person operations at 50% of capacity. Even where the nature of the business does not allow for social distancing (such as hair salons or dine-in restaurant service), the business may operate so long as service providers wear masks.

The Employer also notes that on June 2, the City of Kansas City conducted an in-person local election, with precautionary measures, that had been originally scheduled for April 7. The Employer has incorporated several of the steps taken in this city in its plan for the current election. That plan includes:

- Voting in a tent near an entrance to the facility;
- The 12 feet by 12 feet tent will have walls for privacy and be large enough to maintain distance between the Board representative and observers, and between the Board representative and the voter, except for the moment when the voter receives his or her ballot;
- Within the tent an eight-foot protective barrier, a plastic guard between the voter requesting a ballot and the Board representative distributing the paper ballot. The barrier would block direct face-to-face contact but allow the voter to identify themselves and the ballot transfer. The observers would be provided similar protective barriers.

- The tent will have two doors and signage to allow for one-way traffic, so that voters would not be meeting each other face-to-face upon entry or exit;
- Hand sanitizer would be provided for use by voters both before and after voting, as well as the Board representative and observers as needed. The Board representative and observers would likewise be provided face coverings and gloves, as well as for any other attendees at the pre-election meeting or any other proceedings at the voting location;
- Single use writing instruments;
- Separate, identical voter lists, and individual marking implements, could be provided to avoid passing material back and forth between the observers;
- The voting area will be thoroughly cleaned and sanitized before and after every voting session. Cleaning and sanitizing supplies will be available in the room for use by the Board representative and observers at their discretion during the voting sessions.
- As is typical, the Board representative would monitor the traffic to insure only one voter in the voting area at a time. Signage and floor markings in the hallway near the voting area would remind employees of social distancing protocols in the event there was a line waiting to vote.
- Photographic evidence of the posting of the Election Notices could be provided in lieu of the Board representative entering the hospital, or the employee/observers could make the inspection if one is required.
- If there is concern about the ballots themselves potentially transmitting virus, the vote count could be delayed for some period of time after the closing of the polls.

The Employer also proposed two suggested voting schedules that would allow sufficient time for all to vote without requiring voters to congregate unnecessarily.

BOARD'S STANDARD

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB at 1154; *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas & Elec.* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two*

Representation Proceedings, Sec. 11301.2. However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* This includes a few specific situations addressed by the Board, including where voters are “scattered” over a wide geographic area, “scattered” in time due to employee schedules, in strike situations, or other extraordinary circumstances. *San Diego Gas*, *supra* at 1145.

On May 8, 2020, the Board, in an Order denying a request for review in *Atlas Pacific Engineering Company*, Case 27-RC-258742, addressed a mail ballot determination in the context of the COVID-19 pandemic. In its footnote to that Order, the Board noted that *San Diego Gas* contemplated “extraordinary circumstances” beyond the considerations described above, and that circumstances in place at the time – federal, state, and local government directives limiting nonessential travel, requiring the closure of nonessential businesses, and the Regional office conducting the election on mandatory telework – constituted a valid basis for directing a mail ballot election in that case after considering the conditions surrounding a manual election.

A MAIL BALLOT ELECTION IS APPROPRIATE

Whether a mail ballot election is appropriate in this case requires considering both the public health concerns presented by the COVID-19 pandemic and the Board’s stated preference for manual elections. The Employer correctly notes that manual elections are the preference of the Board, and I recognize the “potential problems” associated with mail ballot elections referenced by the Employer are some of the reasons that the Board has traditionally preferred manual elections. I do not discount those concerns.

I also agree with the Employer that, absent the present pandemic, a manual election would almost certainly be held in this case. To the extent Petitioner contends the employees are so “scattered” as to time, scheduled to multiple shifts at a facility operating at all times, or place, employed at two facilities located in the same metropolitan area, this is unlikely to be a sufficient basis for a mail ballot election. Prior to the current pandemic the Board regularly conducted manual elections under similar circumstances, and the schedules proposed by the Employer are consistent with how the Board would typically schedule such an election.

However, my decision in this case is ultimately based on my agreement with Petitioner regarding the “extraordinary circumstances” presented by this public health emergency. I recognize that a degree of reopening has begun, in the United States generally and in Kansas City specifically. At the same time, it is not disputed that COVID-19 remains present in the community and presents a well-established and significant health risk. There is not an easily identifiable bright line that can designate when “extraordinary circumstances” have passed while the increased risk of transmission in group activities remains. The difficulty in trying to find a metric on which to base such a decision is demonstrated here by the dueling contentions of the parties; Petitioner cites to the rising number of cases in Jackson County while the Employer

cites to the lowered governmental restrictions. Both arguments have merit in supporting the position argued.

Ultimately, as the Board has made clear, this is a question of discretion. While the Employer has presented a comprehensive plan for a manual election, I find the circumstances of this case make it appropriate to hold a mail ballot election. I find that the extraordinary circumstances presented by the COVID-19 pandemic remain present here for several reasons. First, my decision is based on the number of COVID-19 cases in Jackson County, the undisputed continued presence of the virus in the Kansas City area, and the severity of the COVID-19 risk. In relying on these considerations, I do note what appears to be a recent increase in cases in Jackson County. It is not possible for me to know if this represents an increasing number of infections, a reflection of more widespread testing, better reporting, or simply a momentary spike in cases. However, it does raise the possibility that, if I order a manual election, I will be directing voters and others to congregate under circumstances more dire than those faced today. A mail ballot election avoids this risk.

Second, my decision is also based on the Employer's role as a health care provider. While COVID-19 is present in all aspects of the community, health care institutions, and other institutions where living spaces are in close proximity, present a special risk. The Employer is no doubt aware of this, as demonstrated by its ongoing restriction on regular visitation to its facilities. I recognize the Employer has attempted to mitigate the risk to voters and its patients by proposing to conduct the election in a tent, physically removing the election from the hospital. However, in any manual election voters will still physically come together in a single location, even if dispersed over time and socially distanced. This represents an increased risk of some degree to all those participating. A mail ballot election avoids this risk.

Again, the Employer's plan to address these risks is comprehensive, attempting to place as many barriers as possible between participants. I find, ultimately, a safer manual election still involves physical interactions, congregating, and as such increased risk. Here, the Board has an established procedure that avoids these risks, its mail ballot procedure. While the mail ballot procedure may not be the Board's preferred procedure, it is one of the ways in which the Board conducts an election when circumstances dictate. Under the present circumstances I find it prudent to order a mail ballot election.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.²

² The parties stipulated to the following commerce facts:

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a voting group appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Includes all full-time, regular part-time and prn: Mental Health Techs, Mental Health Tech W/E Alts and PRN Mental Health Techs employed by the Employer from the Health Sciences District campus at 2301 Holmes and the Lakewood hospital at 7900 Lee's Summit Road, Kansas City, Missouri, the only facilities involved herein, but EXCLUDING Mental Health Tech-Outpatients, office clerical employees, professional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **SEIU HEALTHCARE MISSOURI-KANSAS, A DIVISION OF SEIU HEALTHCARE ILLINOIS/INDIANA.**

If a majority of valid ballots are cast for SEIU HEALTHCARE MISSOURI-KANSAS, A DIVISION OF SEIU HEALTHCARE ILLINOIS/INDIANA, they will be taken to have indicated the employees' desire to be included in the existing non-professional unit currently represented by the Petitioner. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

A. Election Details

The Employer, Truman Medical Center, Inc., is a State of Missouri Corporation engaged in the business of patient care from the Health Sciences District campus at 2301 Holmes and the Lakewood hospital at 7900 Lee's Summit Road, Kansas City, Missouri, the only facilities involved herein. During the past year, a representative period, the Employer in the course and conduct of its business operations purchased and received goods and services valued in excess of \$50,000 directly from sources located outside the State of Missouri. The Employer annually derives gross annual revenues in excess of \$1,000,000. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

The election will be conducted by mail. The ballots will be mailed to employees employed in the appropriate voting group at 3:00 p.m. on **Monday, June 29, 2020**, from the office of the National Labor Relations Board, Subregional Office 17 - 8600 Farley Street, Suite 100 Overland Park, Kansas 66212-4677. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Wednesday, July 8, 2020**, or otherwise requires a duplicate mail ballot kit, should communicate immediately with the National Labor Relations Board by calling the Subregion 17 Office at **(913) 275-6525**.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 17 office by **12:00 p.m. (noon) CDT on Monday, July 27, 2020**. The mail ballots will be counted on **Monday, August 3, 2020 at 10:00 a.m.** at a location to be determined, either in person or otherwise, after consultation with the parties, provided the count can be safely conducted on that date. In order to be valid and counted, the returned ballots must be received at the Subregion 17 office prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **June 5, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Thursday, June 18, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Subregion and served electronically on the other parties named in this decision. The list may be electronically filed with the Subregion by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

June 16, 2020

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

DATED at Overland Park, Kansas, this 16th day of June 2020.



William B. Cowen, Acting Regional Director
National Labor Relations Board, Region 14
Subregion 17
8600 Farley Street, Suite 100
Overland Park, Kansas 66212-4677